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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

DAVID C. MEYERS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the federal court below correctly denied Moody's defense of equitable estoppel based on an assumption of approval of valuation of an insurance company asset when such approval is obtained by fraud.

Whether the federal court of appeals correctly applied state law to the principle of equitable estoppel.

Whether the principles set forth in *Bangor Punta Operations, Inc., v. Bangor & Aroostook Railroad*, 417 U.S. 703 (1974) are applicable to this judgment.

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INTRODUCTION

The Petition before this Court is the ninth in a series of petitions for writ of certiorari filed by Shearn Moody, Jr., arising out of the domiciliary and ancillary receivership proceedings in the Courts of Alabama and Texas involving Empire Life Insurance Company of Ameria (Empire). Petitioner (Moody) was the chief executive officer of Empire, an insolvent Alabama insurance company. Respondent is actually the Receiver of Empire, William G.

Ward, Jr. (Receiver). Citations to related litigation are listed below:

Ex parte Moody, 418 So. 2d 93 (Ala. 1982) cert. denied Moody v. Forrester — U.S. — (51 U.S. Law Week 3612, Feb. 22, 1983).

Sumrall v. Moody, 620 F. 2d 548 (5th Cir.) on rehearing 632 F. 2d 1351 (5th Cir.), cert. denied, 450 U.S. 1026 (1981).

Moody v. State ex rel. Payne, 335 So. 2d 1116 (Ala.), cert. denied, 439 U.S. 910 (1978).

Moody v. State ex rel. Payne, 351 So. 2d 552 (Ala. 1977), cert. denied, 435 U.S. 969 (1978).

Empire Life Insurance Co. of America v. Moody, 584 S.W. 2d 855 (Tex. 1979).

Moody v. State ex rel. Payne, 351 So. 2d 547 (Ala. 1977), cert. denied, 434 U.S. 835 (1977).

State ex rel. Payne v. Empire Life Ins. Co., 351 So. 2d 538 (Ala. 1977), cert. denied, 435 U.S. 969 (1978), rehearing denied, 434 U.S. 1089 (1978).

Moody v. State ex rel. Payne, 295 Ala. 299, 329 So. 2d 73 (1976).

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Moody v. Texas, 538 S.W. 2d 158 (Tex. Civ. App. 1976), writ ref'd n.r.e.), cert. denied, 434 U.S. 1068 (1978).

Moody v. Moody Nat'l Bank, 522 S.W. 2d 710 (Tex. Civ. App. 1975, writ ref'd n.r.e.).

Moody v. Crook, 520 S.W. 2d 958 (Tex. Civ. App. 1975).

Moody v. State, 520 S.W. 2d 452 (Tex. Civ. App. 1975), (n.r.e.).

Moody v. Jones, 519 S.W. 2d 536 (Tex. Civ. App. 1975).

Empire Life Insurance Co. v. State, 492 S.W. 2d 366 (Tex. Civ. App. 1973).

Day v. State, 489 S.W. 2d 368 (Tex. Civ. App. 1972).

STATEMENT OF THE CASE

1. **Background**—Petitioner Shearn Moody, Jr. is the former president, Chairman of the board of directors and principal stockholder of Empire Life Insurance Company of America. On June 29, 1972, Empire was found to be impaired and insolvent and placed in receivership by the Circuit Court of Jefferson County, Alabama. Empire was adjudicated insolvent on the grounds that a major asset of Empire, an interest in the Libbie Shearn Moody trust ("the Trust"), had been overvalued by Empire. Though an appeal from this adjudication was expressly authorized by Alabama law, Moody did not appeal. *Moody v. State, ex rel. Payne*, 344 So. 2d 160, 164 (Ala. 1977) cert. denied, *Shearn Moody v. Charles H. Payne, etc.*, 434 U.S. 996 (1977).

By March, 1972, several stockholders had filed a derivative action against Moody for breach of fiduciary duty, mismanagement and common law fraud. This action was taken over by the Receiver of Empire, the Commissioner of Insurance, State of Alabama, John G. Bookout. The Receiver's complaint was filed in June of 1974. The case proceeded to trial in December, 1976 with a verdict being rendered in favor of the Receiver in January, 1977. Following extensive post-trial briefing, the Court entered judg-

ment in favor of the Receiver in May of 1979.

2. **The Case That Was.**

> "A critical *factual issue* has been the designation of responsibility for the $14,403,200 value placed on the life interest. Moody claimed that responsibility rested with national accounting firms, an independent actuary and the Alabama Superintendent of Insurance. The jury found that the value increase was done by Moody as part of a scheme to defraud. As will be seen, that finding is supported by the evidence." (Emphasis supplied) (Appendix A-2).

During the course of trial, at least six (6) witnesses offered by the Receiver testified in detail as to Moody's negligence and breach of fiduciary duty including three (3) insurance executives who had worked under Moody at Empire. Multiple witnesses testified that the cause of the demise and collapse of Empire was due to Moody's reckless acquisition program which could not have been implemented but for the mark up valuation of the Moody trust interest from $5.8 million to $14.2 million within the space of one (1) year in the early stages of history of that company (1965-66). Three experts (accountants, actuaries and insurance executives) detailed their opinions based upon extensive studies of the record of Empire to the extent of damage.

The Receiver's proof of ultimate fact issues went virtually unchallenged. Moody put no experts on the stand. Moody produced no witnesses to contest the evidence of fraud, to attest to the prudence of his management or to the advisability of undertaking the extended program of acquisition and expansion utilizing the artificial surplus created by the valuation of the life interest in the Moody trust. Indeed, Moody did not even produce an independent witness to support the 1965 $14 million valuation on the trust. Moreover, Moody's counsel chose not to confront the

substantive testimony seeking only to impeach the legitimation of the Receiver's fact witnesses.[1]

At trial the Receiver did not attack the acquisition program as such even though there were indeed bad aquisitions. Rather, it was the fraud, imprudence and negligence of allowing an under capitalized life insurance company to embark upon an aquistion program by virtue of a paper surplus of $14 million established without appraisal or verification when Empire was receiving between $165,000 to $250,000 income from the trust and did not have true surplus asset resources with which to withstand the risk of such growth and attendent expenses. Moody's defense was that he relied upon the Alabama Insurance Commissioner's approval of the $14 million valuation (which he fraudulently induced) and would not have done anything in terms of acquisition policy without that approval. No one appeared for Moody to say that he relied on his own fraudulently obtained approval.

Moody's witness, former Alabama Insurance Commissioner, Frank Ussery, conceded that an appraisal was a necessary predicate to an approved valuation by his department. He further testified that he had assumed, as late as 1971, that the valuation placed by Empire on the trust interest was predicated on an appraisal, which the evidence established never occurred, although Moody fraudulently represented it had.

There was no evidence of any "valuation" made by the State of Alabama. To the contrary, the overwhelming evi-

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[1] Certainly there can be no inference as to inadequacy of representation. Moody's counsel were the best. At trial, were the reknown trial lawyers John Hauer of Dallas and Roy Cohn of New York together with Dean Carlton, Professor Allen Bromberg joined by the firm of Jenkins & Gilcrest. In addition to quality, Moody also had quantity. By count, Moody had 12 separate law firms of counsel of record through the time of jury verdict and that figure now numbers 24.

dence was simply that the State of Alabama accepted the valuation placed on the trust by Moody and that acceptance was premised on a false assumption fraudulently induced, that an appraisal of the trust had been made for $14.2 million by Ernst and Ernst and/or Peat Marwick and Mitchell.

REASONS FOR DENYING THE WRIT

With liability based solely upon state law grounds, the decision of the Fifth Circuit in this case raised no important federal questions. The court properly applied well-settled concepts of state law in affirming the jury's findings of intentional misconduct, gross negligence and violation of Moody's fiduciary duties.

Moody's Petition revolves around and seeks relitigation of factual issues that were decided against Moody by the jury, the district court and the Court of Appeals. In order to reverse the court below, this Court would be called upon to review the factual findings of the jury and to determine that they should be set aside. Granting this Petition would be contrary to this Court's policy that "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

ARGUMENT

I.

DEFERENCE TO STATE ADMINISTRATION OF STATE PROGRAMS

> "Moody also argues that Receiver is equitably estopped from bringing this action because Moody increased the value of the life interest and pursued the subsequent acquisition program in reliance on the approval issued by Empire's shareholders and board of directors and that Alabama Department of Insurance. *The sole virtue of this contention is audacity.* The

> doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it. A party may not invoke an estoppel for the purpose of shielding himself from the results of his own fraud, dereliction of duty, or other inequitable conduct." (Emphasis supplied) (A-19).

The above quotation from Judge Reavley's excellent opinion in the Court of Appeals, *Moody v. Meyers, et al*, 475 F. Supp. 232 (5th Cir. 1982) best answers the argument presented here by Moody.

Moody starts with an assertion that there is a duty on the part of the Insurance Department of the State of Alabama to "value" the assets of the insurance companies operating within its borders.[2]

Moody next leaps to the conclusion that there is in fact a valuation by the Commissioner of Insurance of the State of Alabama and states:[3]

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[2] Moody's argument of Alabama law is nothing short of incredible. Moody cites Title 28, Section 61, *Code of Alabama Recompiled 1958*, (totally inappropriate, this section is the standard valuation of reserves section of 1958 requiring companies to value reserves in accord with standard tables and any assets to meet those reserves.) He also cites Section 27-37-1 *Code of Alabama 1975*. His obvious reference is to:

> "(13) Other assets, not inconsistent with the provisions of this section, deemed by the commissioner to be available for payment of losses and claims at values to be determined by him."

This subsection and succeeding sections of the chapter dealing with assets *were not added to the Alabama Code until 1971* some six years after the "valuation" in question! Section 745, Act No. 407, Acts of Alabama 1971, p. 707.

[3] It was Moody's witness, former Commissioner Ussery who pointed out on cross examination that defense exhibit 6 (relied on by petitioner to support the allegation that the "valuation" was made by the Alabama official, page 3 of Petition) did not contain the customary certificate in that the Department certified verification and evaluations of the *liabilities only* (see Appendix A-9).

> "While the suit did not directly challenge the actions of the Alabama Department of Insurance, the claims in the end invited the federal courts to determine that those actions were wrong." (Petition page 13)

Moody's arguments that the Court of Appeals' decision jeopardizes the independence of state governments stands federalism on its head. Perhaps the most immediately telling point in demonstrating the absurdity of his contention is that the *plaintiff* in this action was the Alabama Commissioner of Insurance, the very state official whose "independence" Moody claims is being invaded by the suit. To say that the acceptance of the Receiver's position by the courts below fails to show deference to the Alabama Commissioner of Insurance is the height of illogic. Suits such as this one by the statutory Receiver, as expressly authorized under state law, complement, rather than interfere with, state regulation of insurance companies.

This action did not put the federal court in the position of "collaterally attack[ing]" any determinations of the Alabama Department of Insurance, nor of "second-guessing the decisions of state administrators." Moody was not "found liable for decisions made by state agencies." He was found liable for his own fraud, gross negligence and breach of fiduciary duties, including, but no limited to, the temporarily successful fraud on the Alabama Department.

Moody's argument is analagous to one obtaining Securities and Exchange Commission approval of a filing and thereafter maintaining that a 10b-5 action is barred. Moody in effect states having obtained approval of the Alabama Insurance Department by fraud, any further actions are barred.

Under the laws of Alabama the doctrine of estoppel does not ordinarily operate against the State or its agencies. *Marsh v. Birmingham Board of Education*, 349 So. 2d

34 (Ala. 1974). Further, and most important, one who invokes estoppel must have in good faith been ignorant of true facts at the time the representation was made to him and at the time he acted on it; he must also show he acted with diligence to learn the truth. *Goforth v. Hallmark Pools*, 393 So. 2d 989 (Ala. 1981).

The Commissioner of Insurance as Receiver of Empire brings this action based on Moody's fraud in fixing a valuation of $14.2 million on the trust interest assigned to Empire. The actions of all insurance departments, stockholders, directors and other interested parties were predicated on an assumption that Moody had an "appraisal" by a national accounting firm. This is an issue of fact, fact determined by a jury based on overwhelming testimony and written documents introduced into evidence. It should not be disturbed.

II.
THE COLLATERAL ATTACK STATE LAW

Moody next urges to this court that the Court of Appeals has allowed in effect a collateral attack on a judicial holding of a state administrative agency. Nothing could be further from the fact.

The Commissioner of Insurance of Alabama did not make a collateral attack. He made a frontal attack. A direct attack on the false and fraudulent valuation of the principal asset of Empire Life Insurance Company of America. That attack was made in an Alabama state court. Moody was there. Moody was a party.[4]

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[4] In fact, during trial of this case Moody's counsel conceded to the trial court that the valuation by the Alabama receivership court was res judicata and that Empire was insolvent on June 29, 1972.

> "Moody did not contest the finding of insolvency and made no appeal from the trial court's ruling of June 29, 1972. Apparently Moody accepted the insolvency finding because when the receiver obtained approval from the lower court to solicit reinsurance proposals Moody was one of those who submitted plans for the rehabilitation of the company. Moreover, Moody made no issue of Empire's insolvency during the lengthy hearing in April, 1974, when the issue of rehabilitation or reinsurance was aired." *Moody v. State ex rel. Payne*, 344 So. 2d 160, 164, (Ala. 1977).

The collateral attack, if it exists is the attempt by Moody to now attack the holding of the Alabama courts in fixing the value of the trust by ignoring it and trying to revive the 1965 approval. He seeks to give it some semblance of validity, stability and respectability through a quasi judicial theory.

But it doesn't exist. Empire was simply allowed to carry the value of the trust interest at $14 million based on documents, annual statements, letters and other representations and assurances that there was a "valuation" by a national accounting firm and actuaries at the higher value. In fact there was not. The "valuation" was a fraud, and Moody did it.

III.
BANGOR PUNTA

Moody's reliance on *Bangor Punta Operations, Inc. v. Bangor and Aroostock Railroad Company*, 417 U.S. 703 (1974) is best answered by the considered opinion of the Fifth Circuit (A-16 through A-18). Quite simply put, *Bangor Punta* is not appropriate to the case in point.

The instant lawsuit began in March of 1972. The com-

pany went into receivership June, 1972. Bids for reinsurance were not taken until late 1973. The reinsurance itself did not take effect until 1975 and the receiver by the express terms of the reinsurance agreement, held out this cause of action as an asset for the benefit of all creditors.

Protective Life bought policyholder liabilities far exceeding the accompanying assets. In return, they demanded and received certain moratorium benefits on policies assumed together with certain benefits on the proceeds of this litigation. A windfall simply does not exist.

CONCLUSION

This suit is a suit for damages with common law causes of action involving no national or federal questions. It was correctly decided in the courts below.

Based on the foregoing, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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